

No. 82-1477

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ALEXANDER L. STEVENS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY
and GRAHAM BEACH PARTNERS,

Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI,
and EDUARDO E. MALAPIT, in his capacity as
MAYOR OF THE COUNTY OF KAUAI,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF HAWAII

MOTION TO DISMISS OR AFFIRM

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March 19, 1983

QUESTIONS PRESENTED

1. Whether a non-final decision by the Hawaii Supreme Court, which rests on adequate non-federal grounds and remands to determine remedies after further discovery, is reviewable by this court.

2. Whether alleged federal questions never decided in the state courts nor raised until after a decision and judgment of the highest state court are reviewable by this Court.

3. Whether Petitioners, who under state law failed to acquire vested rights in a prospective development, may relitigate its case in this Court on the basis of factual issues determined adversely to them in the state court.

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Appellees.

MOTION TO DISMISS OR AFFIRM

Respondent in the above-entitled case moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Hawaii on the ground that no substantial federal question exists.

STATEMENT OF THE CASE

A. Facts

Petitioners¹ seek review of questions never raised until after a decision by the Hawaii Supreme Court and based entirely on numerous factual assertions determined adversely to them.

In 1974 Petitioners here, [collectively "Graham"] purchased shoreline property in Kauai, known as Nukolii (App. at A-4). Like all the surrounding property, it had been zoned for decades open space/agricultural use (App. at A-5). Graham hoped to build condominiums and a hotel, and in 1979 persuaded the County Council to rezone part of its property to "resort" (App. at A-5). Immediately thereafter, the Committee to Save Nukolii, a broadbased citizen coalition, and Respondents here ["the Committee"] obtained certification of a referendum to reinstate the area-wide zoning (App. at A-5).

Instead of awaiting the impending referendum, Graham accelerated efforts to obtain building permits. They obtained a

¹As discussed below, the constitutionality of the Kauai County Charter referendum provisions was never drawn in question or passed upon by the state court. This case is therefore not properly before this Court by appeal and should be treated as a petition for certiorari. 28 U.S.C.A. § 2103. See *Kulko v. Superior Court of California*, 436 U.S. 84, *reh. den.*, 438 U.S. 908 (1978). Hence, Graham Beach is hereafter referred to as "Petitioner" and the Jurisdictional Statement as the "Petition."

condominium permit only four days (App. at A-6, -21) and one for the hotel only one day prior to the referendum vote. (App. at A-6) On November 4, 1980, the people of Kauai passed the Referendum 10,794 to 5,618, the largest margin in any Kauai election (App. at A-6). On November 4, 1980, (1) Graham had commenced construction of several condominium foundations using a permit obtained by misrepresenting the kind of sewage system to be used (App. at A-21, n.18-19), and (2) no construction contract was signed for the hotel and no work at all had begun. Nevertheless, the Developer decided to undertake a "gamble" and started construction while the case was in litigation (App. at A-19, n.15).

B. Proceedings and Rulings Below

Kauai filed for declaratory judgment in state trial court on November 25, 1980, naming Graham and the Committee as parties (App. at A-6). Graham advanced no federal arguments and moved for summary judgment, arguing that under state law the County was equitably estopped from enforcing its zoning. The trial court granted the motion (App. at A-6, -7).

On appeal, the state Supreme Court, in a unanimous decision, reversed. It found that Graham had failed to establish facts to prove any one of the four elements required under Hawaii law for equitable estoppel (App. at A-12 to A-22). First, analyzing the evidence, which included Petitioners' contracts and the particular building permits, the court found that the requisite showing under state law of an 'official assurance' had not been made (App. at A-17). Second, the court examined the precise sequence of events, the representations of Petitioners and the loan documents and concluded that "the good faith requirements of zoning estoppel [were] not demonstrated by the developers"

(App. at A-20). Third, the court found as a fact that in spite of exaggerated claims made by Graham, allowable expenditures made were insufficient to establish equitable estoppel (App. at A-19). Finally, the court made specific findings, based on Hawaii Real Estate Commission reports and other evidence that reliance by Petitioners was "unreasonable" (App. at A-20), that they had engaged in a "race of diligence to undermine the referendum process" (App. at A-21), and that the actions taken by Petitioners were "speculative" (App. at A-21) and, based on long standing Hawaii development practice, "could not give rise to reasonable expectations upon which to base investments" (App. at A-24).

Graham filed a Motion for Reconsideration alleging for the first time constitutional issues which it admitted had "never been briefed." The motion was denied *per curiam*.

ARGUMENT

I. THE DECISION BELOW IS NOT A FINAL JUDGMENT. IT REMANDS TO DETERMINE REMEDIES AND DAMAGES AND WILL REQUIRE EXTENSIVE CONTINUED PROCEEDINGS.

Jurisdiction of this Court is predicated on "final judgments" of the highest state court. 28 U.S.C.A. § 1257. This Court has consistently refused to review state court judgments that determine liability but remand for damages, *see e.g., Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917), or those that require further continued proceedings. *See San Diego Gas & Elec. Co. v. City of San Diego*, 420 U.S. 621 (1981). This case fits squarely within both exceptions. The Supreme Court below determined liability and remanded to determine

the appropriate remedy (App. at A-25, n.22).² The remand to the trial court, which will be extensive and evidentiary, thus renders the decision non-final and precludes review.³

Moreover, in *San Diego Gas & Elec. Co.*, *supra*, this Court remanded because the state court had not decided whether any taking had in fact occurred. This case presents an even clearer situation for this Court to decline jurisdiction. Graham's "taking" claim, if any, is necessarily dependent on the scope of its property rights and evidence to establish those rights was never presented to the state courts. Because of the absence of such information as well as the failure of the state court to decide any "taking" question, Petitioners lack both the factual and legal bases for any such claim.

The final judgment rule "derives added force" when a state court decision is involved, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945), particularly because of "the policy against premature constitutional adjudications." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71 (1948). The Court should therefore dismiss this Petition or affirm the Hawaii Supreme Court's decision.

²For example, any public improvements (Petition at 11-12, 21 n.16) can be accommodated by appropriate relief on remand. At this time, it is even possible that any completed structure may be allowed to remain.

³The judgment of the Hawaii Supreme Court was not a final decision on any federal questions, *see* discussion at 8-9, *infra*, and hence is not within the categories of cases discussed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

II. FEDERAL QUESTIONS NEVER PRESENTED TO THE STATE COURTS AND RAISED FOR THE FIRST TIME IN A MOTION FOR RECONSIDERATION ARE NOT SUBJECT TO REVIEW BY THIS COURT.

Aside from the absence of substantive merit to Petitioners' argument, a critical threshold requirement for review is that the questions first be presented to the state courts, 28 U.S.C.A. § 1257, "with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928). Issues raised for the very first time in a motion for reconsideration are not subject to this Court's review. *Herndon v. Georgia*, 295 U.S. 441 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932).

Petitioners' attempt to argue constitutional issues for the first time in this extensive litigation before this Court borders on the absurd. As admitted by Petitioners, not a single alleged federal issue in their Petition was ever raised in the pleadings or briefs or in any oral argument in any Hawaii court (Petition at 14). Instead, they were raised only after the Supreme Court decision, by Motion for Reconsideration designed merely to construct an artificial basis for an attempt to take a petition to this Court.

Moreover, Petitioners fail to advance any reason for not anticipating a Fourteenth Amendment argument at any previous level if they believed it had merit. They can hardly claim that the Fourteenth Amendment is obscure and are unable to specify any factors that were not present throughout the litigation. Their claim of "constitutional issues" is an effort to obtain *de novo* review, and they should not be permitted to raise them for the first time after a decision of the highest state court. *See also*

Bailey v. Anderson, 326 U.S. 203 (1945) (arguments presented to state courts in terms of state law cannot later be shifted into federal questions). Otherwise litigants would be encouraged to reserve a federal argument for a last ditch effort in the Supreme Court after they had unsuccessfully litigated in state court. The Motion for Reconsideration was not a timely presentation of the questions, which are not now subject to review. See *Webb v. Webb*, 451 U.S. 493 (1981); *Hanson v. Denckla*, 357 U.S. 243 (1958).

III. THIS COURT WILL NOT REVIEW JUDGMENTS SUCH AS THIS THAT REST ON ADEQUATE NON-FEDERAL GROUNDS.

This court will not review state court judgments that rest on independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1945). The decision of the state court here was predicated on analysis of both the local County Charter and the state's own law of vested rights and equitable estoppel (App. at A-10). Petitioners' real objection is to the state court's application of state law, which does not raise a federal question appropriate for review. *Agins v. City of Tiburon*, 447 U.S. 255, 259, n.6 (1980).

The Petition distorts considerably both the language and the fair meaning of the state court's decision. Petitioners accuse the Hawaii Supreme Court of equating "whether there was a constitutional taking within the meaning of the Fourteenth Amendment with whether there was 'estoppel' or 'vested rights'" (Petition at 18). However, the Hawaii Supreme Court never held nor implied that at all. The Court definitively based its holding on state law and in finding that the referendum was entitled to be

enforced stated: "This conclusion is based on a concept of 'vested rights', as that term is used in the charter" (App. at A-22). The state Supreme Court simply recognized that putting up structures in the hope that a court thereafter will hesitate in removing them undermines the state and local governments' orderly development permit process. The court noted in passing that its decision "is consistent with constitutional concepts underlying the vested rights doctrine" (App. at A-22). Petitioners now strain mightily to read into this line the notion that the court decided the case on federal grounds. This attempt to read a federal question into dicta does not alter the nature of the state court's decision. This Court has repeatedly insisted that it "reviews judgments, not statements in opinions . . ." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Because the decision rested on independent and entirely adequate state grounds, the Petition should be denied on that ground alone.

IV. PETITIONERS' ARGUMENTS REST ON NUMEROUS MISSTATEMENTS OF FACT, ASSERTIONS OUTSIDE THE RECORD AND ALLEGED FACTS CONTRARY TO FINDINGS OF THE STATE COURTS.

Graham's Petition is remarkable for the absence of citations to the decision of the Hawaii Supreme Court. *All* of Petitioners' claims are premised on factual determinations decided adversely to them in the lower courts, on misrepresentations, and on evidentiary assertions wholly outside the record. Their "taking" argument starts, for instance, from the premise that their investment was sufficient to establish a prospective property right. Petitioners advance wholly unsupported and wildly exaggerated

figures (Petition at 5, 21) and claim \$4.3 million invested in the development (Petition at 20). There is absolutely no basis in the record to support these figures. Indeed, the state court found, based on the evidence presented by Petitioners, that many of the expenses incurred were revocable (App. at A-19, n.15) and that for some of the claimed expenses, there was no record of payment (App. at A-19, n.15).

Additional self-serving statements include the assertion that numerous condominium purchasers had invested in the project (Petition at 5, 11) and that substantial funds had been spent in building the hotel. *Id.* The Hawaii Supreme Court found as facts, however, that as of November 3, 1980, there were only four (4) sales contracts for the condominiums (App. at A-19, n.16) and that potential purchasers were warned about the referendum (App. at A-20). As of February 9, 1981, the date of the trial court's decision (and well *after* passage of the referendum), neither a construction contract nor a management agreement had been procured for the hotel. Equally important, in the four-day interval between obtaining the first of the valid building permits and the day of the referendum vote, Graham's single expenditure was the \$24,907.50 building permit fee (App. at A-22) which is recoverable (App. at A-25). Any other expenditures were based on invalid building permits (App. at A-21) and were found to be "not only speculative but also fell short of good faith as manifestations of a race of diligence to undermine the referendum process" (App. at A-21).

Other critical misstatements are contained in Petitioners' strained attempt to establish that the Hawaii Supreme Court "badly misconstrued *Eastlake*" (Petition at 25). The state

court's reference in passing to *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) is at best a mere recitation of the general proposition that zoning referenda are compatible with due process. See App. at A-23. Moreover, this Court's concerns in *Eastlake* are simply not applicable to the instant case. First, this case presents the converse of the abstract question posed by Petitioners—that is, whether a referendum “freezes” land use. In this case, Graham raced forward “to undermine the referendum” (App. at A-21) and to procure permits instead of proceeding in an orderly process. Even after this race, any “sterilization” (Petition at 25) of Graham's land occurred for no more than four days, the time between the issuance of the first valid building permit and the date of the referendum. Second, the record is clear that the Nukolii site and all surrounding property were originally zoned agricultural (App. at A-5), and the state court found as a fact that the referendum restored the “compatibility” of the site with “the county zoning of bordering acreage, which prohibits resort development” (App. at A-23). Accordingly, Petitioners' factual claim that the referendum singled out its property (Petition at 22) without reference to a general comprehensive scheme, *id.*, is directly contrary to the findings of the court below.

Finally, Petitioners base their claim on the factual premise that they acquired an irrevocable right to commence construction on land which was zoned agricultural when acquired. But under state law, Graham had not established *any* of the four elements necessary to demonstrate a vested right in the inchoate development (App. at A-12 to A-22). Nor did it have the kind of “reasonable investment expectation,” *see Agins v. City of Tib-*

uron, 447 U.S. 255 (1980); *Penn Central Trans. Co. v. N.Y. City*, 438 U.S. 104 (1978), cognizable as a possible basis for a taking claim. Such a question was never presented to the state courts. Indeed, to the extent that there is factual material on the question, it belies Petitioners' contentions. Upon careful review of the contracts, loan agreements, the permit decision and other evidence, the court held that the Developers' "expenditures and site preparation work constituted business risks. . ." (App. at A-24). Consequently, this Petition is an attempt to relitigate a case based upon rejected factual claims.

In *Penn Central*, *supra*, this Court rejected as "quite simply untenable" the contention that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development . . ." 439 U.S. at 130. The interest of Graham is much more attenuated than that in *Penn Central*. Here, the state court found, based on an analysis of the contracts and other documents, that Graham, a sophisticated and experienced investor, did not even actually believe that the site "was available for development", but merely hoped that it was and, proceeding in bad faith, undertook a business gamble. See App. at 15-16, -20, -24. Even if the issue had properly been presented to the state court and ruled upon by it, this falls far short of the kind of established development right this Court might wish to protect.

In conclusion, this Court does and should abstain from reviewing *de novo* state law issues in this case which are presented in the guise of "federal" questions, especially where those issues were dependent on numerous factual findings by the state court adverse to Petitioners.

V. THE QUESTIONS ARE NOT SUBSTANTIAL.

Aside from the failure to satisfy procedural requirements and the lack of substantive merit of Petitioners' arguments, both the factual and legal issues are unique to this case and are very likely never to arise again. For instance, the eleventh-hour obtaining of building permits, the act of proceeding to build after the referendum passed and after the case had been argued and submitted to the state Supreme Court will not likely be repeated. Moreover, the probability that the referendum will recur in similar circumstances is infinitesimal. The opinion below encourages development, but reaffirms to this investor that permits obtained by bad faith and without actual or reasonable reliance are unacceptable with all the implications that such conduct has for undermining confidence in local government and the orderly development process.

Petitioners' claim that the Hawaii decision "will be contagious" (Petition at 29, n.18) is unrealistic. Each state and the localities therein have their own permit mechanisms and property law which are inextricably intertwined with common law equitable estoppel rules and local development practices. States have therefore arrived at a variety of formulations in developing their own rules. The Kauai County Charter and the relevant referendum provisions therein are peculiar to that single island and have been clarified by the electorate only recently in the 1980 election. Although many equitable estoppel cases tend to be peculiar to the circumstances and facts therein, the instant case is especially so. The decision below was and is necessarily depen-

dent on the status of the state law on the subject, and local development practices and agency procedures as well as state and private documents such as those of the Hawaii Real Estate Commission and various local contracts.

Moreover, the Hawaii Supreme Court decision is hardly remarkable in the area of equitable estoppel, but constitutes a midpoint in the spectrum of positions taken by various jurisdictions (App. at A-13, n.8).

In the final analysis, Petitioners' discussion of abstract legal principles conveniently omits the facts of *this* case, which establish the total absence of any constitutional questions and limits its significance to the litigants in this case and the County of Kauai. In fact, Petitioner is now in the position of arguing that a developer who is not in good faith (App. at A-21); who engages in a "race of diligence to undermine the referendum process" (App. at A-21); whose reliance on "county approvals" would have been "unreasonable under the circumstances" (App. at A-20) and who in fact did not "reasonably rely on . . . actions of county officials" (App. at A-19); who "proceeded at risk" (App. at A-19) to make expenditures, much of which "must be disregarded outright as speculative" (App. at A-19, n.15); who obtained a building permit the day before the referendum (App. at A-21); who lost the referendum by a 2 to 1 margin of the populace (App. at A-6); who had not started construction or even signed a construction contract for the hotel and who had barely commenced the foundations of the condominiums at the time the referendum passed, has a constitutional claim even though neither that contention, nor any facts to support it, was raised or passed upon at any level at any time in state court.

CONCLUSION

For the foregoing reasons, Respondent moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Hawaii.⁴

March 19, 1983

Respectfully submitted,

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⁴Given the heavy caseload of this Court, Petitioners' frivolous appeal, which misrepresents the facts and lacks numerous threshold procedural requirements as well as substantive merit, warrants an award of reasonable damages to Respondent under 28 U.S.C.A. § 2103.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this *Motion to Dismiss or Affirm* upon Appellant and Appellees pursuant to Supreme Court Rule 28 by placing three copies in the United States Mail with first class postage prepaid, addressed to:

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